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No. 116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Appellants,

against

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Appellants,

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Appellee.

APPELLANT'S BRIEF

Opinions Below

The opinion of the three-judge District Court (R. 191-208) sought to be reviewed is reported at 212 F. Supp. 376.

The opinion of this Court dated June 25, 1962 (R. 60-62), remanding this case to the District Court, is reported at 370 U. S. 713. That opinion was rendered upon review, by way of writ of mandamus, of the opinions by Judge BICKS, dated November 4, 1960 (R. 27-32; reported at 188 F. Supp. 434), Judge DIMOCK, dated December 28, 1960 (R. 33-37), not officially reported, and Judge CASHIN,

dated May 3, 1961 (R. 42-47; reported at 194 F. Supp. 3), and also upon writ of certiorari to the Court of Appeals for the Second Circuit, whose decision is reported at 289 F. 2d 426 (R. 47-58).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

This is a direct appeal from the judgment of a three-judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284 in the United States District Court for the Southern District of New York. The judgment, dated and entered February 5, 1963, declared that the application to appellee of New York Alcoholic Beverage Control Law §§ 3 (subd. 28), 62 and 100 (subds. 1 and 2), is repugnant to the Commerce and Supremacy Clauses of the Constitution of the United States, and also permanently enjoined appellants from applying and enforcing those statutory provisions against appellee and its operations.

A notice of appeal to this Court was filed in the United States District Court for the Southern District of New York on March 13, 1963 (R. 213-215), and appellants' jurisdictional statement and the certified record were filed in this Court May 6, 1963. On October 14, 1963, this Court noted probable jurisdiction (R. 215).

Questions Presented

1. Whether the application of the liquor licensing requirements of the New York State Alcoholic Beverage Control Law to appellee, a New York corporation engaged in the purchase and importation of intoxicating liquors from out-of-State wholesalers for resale to departing airline passengers at its private premises in the State of New York, violates the Commerce and Su-

premacy Clauses of the Constitution of the United States and § 311 of the Tariff Act of 1930 as amended (19 U.S.C. § 1311).

2. Whether appellee's operations are subject to New York's liquor control laws by virtue of the Twenty-first Amendment to the federal Constitution.

3. Whether the Commerce Clause precludes the State of New York from terminating appellee's liquor operations for failure to comply with New York's liquor licensing laws.

4. Whether the District Court erred in imposing a subjective test to determine the reasonableness of the application of New York's Alcoholic Beverage Control Law to appellee's liquor operations, and in basing that test, moreover, on the question of possibilities of diversion of liquors within the State.

Constitutional and Statutory Provisions Involved

United States Constitution, Art. I, § 8:

> "The Congress shall have power, • • • 3. To regulate commerce with foreign nations and among the several States, and with the Indian tribes."

United States Constitution, Art. VI, § 2:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof • • • shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Amendment XXI, § 2:

> "The transportation or importation into any State, Territory, or possession of the United States for de-

livery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

27 U.S.C. § 121 (Wilson Act) is set forth at page 34, *infra*.

§ 311 of the United States Tariff Act of 1930, as amended (19 U.S.C. § 1311), is set forth in the Appendix to this brief, at pages 38-41, *infra*.

New York Alcoholic Beverage Control Law § 3, subd. 28, § 62 and § 100, subds. 1 and 2, are set forth in the Appendix, at pages 42-43, *infra*.

Statement of the Case

Appellee, a New York corporation, is in the business of selling bottled wines and liquors—foreign as well as domestic—to international airline passengers at its main office located on the second floor of the Arrivals Building at New York International Airport in the City and State of New York.[1] Appellee also leases space in the Pan American and T.W.A. terminal buildings at the airport where orders for the sale of liquor are taken (R. 99).[2]

Appellee purchases its entire supply of liquors outside the State of New York (R. 152) from wholesalers located in Philadelphia, Baltimore, and Washington, D. C. (R. 105). The liquors thus purchased are transported into New York

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[1] Appellee's premises are not located on Federal Territory. Although appellee leases its space at the Arrivals Building from the Port of New York Authority, appellee's premises are fully subject to the territorial jurisdiction of the State of New York, as the court below recognizes in Footnote 4 of its opinion (R. 193).

[2] Appellee is presently operating an additional sales office at the East Side Airline Bus Terminal at First Avenue and East 37th Street in midtown Manhattan. See *New York Times*, November 24, 1963.

and stored in the rear of appellee's private office in the Arrivals building (R. 111) until orders for their resale to airline passengers have been received and paid for at appellee's office (R. 142). The wines and liquors are then allegedly placed upon the passengers' planes for delivery to the passengers upon arrival at their foreign destination (compl. par. 4, at R. 4).

The appellee commenced its liquor operations at New York International Airport in April, 1960 (R. 121). In response to appellee's inquiry as to the applicability of the New York liquor control laws, the New York State Liquor Authority, by letter dated July 11, 1960, informed appellee that its business was illegal under the provisions of the New York Alcoholic Beverage Control Law. This was based upon an opinion of the Attorney General of the State of New York attached to the Authority's letter (R. 17-20), which stated that appellee was engaged in "selling" alcoholic beverages within the meaning of § 3, subd. 28[3] of the Alcoholic Beverage Control Law, and that its business would therefore be illegal in the absence of the license required by § 100, subd. 1 of that Act.[4] The Attorney General's opinion also cited Rule 17 of the Rules of the State Liquor Authority, which provides that no additional licenses be issued within the counties of the City of New York for sale at retail of alcoholic beverages for off-prem-

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[3] New York Alcoholic Beverage Control Law § 3, subd. 28, provides: "'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

[4] Section 100, subd. 1, provides: "No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

ises consumption.[5] Even if the Liquor Authority were to amend Rule 17 for the purpose of licensing appellee's particular operation, the Attorney General noted that appellee's premises as presently constituted did not physically meet the statutory provisions of § 105, subd. 2, requiring an entrance from the street level and a location on a public thoroughfare.[6]

Appellee has never applied for any license to sell or traffic in wines and liquors in the State of New York, nor has it instituted any action in the state courts to review the opinion of the Attorney General or the action of the Liquor Authority, or to secure injunctive or other relief.

On July 22, 1960, appellee instituted this action in the United States District Court for the Southern District of New York for declaratory and injunctive relief against appellants as members of the State Liquor Authority. The complaint alleges that appellee's liquor operations are authorized by § 311 of the United States Tariff Act of 1930 as amended (19 U.S.C. § 1311) and the regulations thereunder, and asks judgment declaring the application

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[5] Rule 17 was enacted pursuant to § 17, subd. 2 of the Alcoholic Beverage Control Law which empowers the Liquor Authority "to limit in its discretion the number of licenses of each class to be issued within the state or any political subdivision thereof * * *". The Liquor Authority's right under Rule 17 to refuse to issue new licenses was upheld by New York's highest court in *Brenner* v. *O'Connell*, 308 N. Y. 636, 127 N. E. 2d 715 (1955).

[6] New York Alcoholic Beverage Control Law, § 105, subd. 2, provides: "No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal."

The constitutionality of this section was sustained in *Evers* v. *Dimino*, 186 Misc. 136, 61 N.Y.S. 2d 504 (1946). See also *Lipshitz* v. *T. & D. Wines and Liquors, Inc.*, 190 Misc. 261, 75 N.Y.S. 2d 321 (1947).

of the licensing provisions of the Alcoholic Beverage Control Law to be repugnant to the Commerce, Export-Import and Supremacy Clauses of the United States Constitution, and for an injunction restraining the State Liquor Authority from applying the state statutes to its business.

Appellee's motion for the impanelling of a three-judge court under 28 U.S.C. §§ 2281, 2284 to hear and determine the controversy was denied by the late Judge Bicks who, while retaining jurisdiction of the cause, held that the federal courts should abstain from passing upon the constitutional issues raised until there had been an opportunity for state court adjudication (R. 27-32).

The appellee appealed to the Court of Appeals for the Second Circuit.[7] Although stating its opinion that the District Court should have convened a three-judge court, the Court of Appeals held that in light of *Stratton* v. *St. Louis S.W.R. Co.*, 282 U. S. 10, it was without jurisdiction to take formal corrective action (R. 47-58).

Thereafter, appellee again filed a motion in the District Court requesting the impanelling of a three-judge court. The request was again refused on the ground that the prior rulings made by other Judges of the District Court had established "the law of this case" and that the Court of Appeals' opinion that a three-judge court should be convened was merely a "dictum" (R. 42-47).

After granting certiorari and a motion for leave to file a petition for a writ of mandamus (368 U. S. 812), this Court ruled that the criteria for the convening of a three-judge court—including the substantiality of the constitutional questions raised—were met here, and remanded the

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[7] During the pendency of the appeal, appellee's renewal of its request in the District Court for a three-judge court was denied by Judge Dimock, but the District Judge issued a temporary order restraining appellants from interfering with appellee's business (R. 33-39).

cause to the District Court for the convening of a three-judge court to consider this litigation (R. 60-62).

Upon remand, the three-judge court, after a hearing at which appellee's president was the sole witness, entered its opinion (R. 191-208) concluding that:

> "The case before us does not, therefore, involve reasonable measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York. The Liquor Authority does not seek to use the power of New York to regulate or supervise. It seeks to terminate. This it cannot constitutionally do." (R. 208).

By final judgment dated and entered on February 5, 1963 (R. 211-212), the District Court (1) declared the application to appellee of New York Alcoholic Beverage Control Law § 3, subd. 28, and §§ 62 and 100, subds. 1 and 2, to be repugnant to the Commerce and Supremacy Clauses of the Constitution of the United States, and (2) permanently enjoined appellants from applying and enforcing these sections against appellee and its operations.

ARGUMENT

Introduction and Summary

What is ultimately at stake in this litigation is the right of the states to regulate and license the movement, distribution and sale of intoxicating liquors within their borders. In adjudging the application of the New York liquor licensing laws and requirements to be repugnant in this instance to the Commerce and Supremacy Clauses of the Federal Constitution, the court below plainly misconceived or disregarded the unique status of state authority and control over intoxicating liquors.

Whatever may be the limitations on state control of interstate or foreign shipments of oil, milk or other ordi-

nary articles of commerce, these limitations have no bearing on traffic in intoxicating liquors. As early as 1890, Congress, by enactment of the "Wilson Act" (26 Stat. 313, now found in 27 U.S.C. § 121), declared that the transportation of intoxicating liquors into any state for "use, consumption, sale or storage therein, shall upon arrival in such State or territory be subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police powers." The effect of the Wilson Act and the subsequently enacted "Webb-Kenyon Act" (37 Stat. 699, presently found in 27 U.S.C. § 122) was to insulate state liquor laws from the limitations of the Commerce Clause by prohibiting the shipment or transportation of liquors into any state in violation of state laws, regardless of the interstate or foreign commerce involved.

Any doubt as to the right of the states to control the movement of intoxicating liquors, free from limitation by the Commerce Clause, should have been dispelled upon the enactment of the Twenty-first Amendment to the Constitution. Since then, this Court has consistently held that § 2 of that Amendment shields state legislation affecting traffic in intoxicating liquors from restriction or limitation by the Commerce Clause, Export-Import Clause, or other provisions of the Constitution. See, *e.g.*, *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936); *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Company* v. *Liquor Control Commission*, 305 U. S. 391 (1939); *Finch & Company* v. *McKittrick*, 305 U. S. 395 (1939); *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Gordon* v. *Texas*, 355 U. S. 369 (1958); *California* v. *Washington*, 358 U. S. 64 (1958).

Appellee's liquor operations, as self-described in its complaint, including the storage, solicitation and receipt of orders and payments for, and sale of, alcoholic beverages at its premises in the State of New York, are clearly subject to the licensing requirements of New York's Alcoholic Beverage Control Law. Moreover, in purchasing its

supply of wines and liquors from out-of-state wholesalers and having them transported to its unlicensed premises in New York in violation of state laws, appellee has openly defied the mandate of §2 of the Twenty-first Amendment.

Despite these factors, the District Court held that New York's liquor control laws could not constitutionally be applied to appellee's operations, construing state power under the Twenty-first Amendment as being applicable only to the state in which liquor is ultimately delivered and consumed. That interpretation is in clear conflict with prior decisions of this Court in *Ziffrin, Inc.* v. *Reeves, supra; Gordon* v. *Texas, supra;* and *Delamater* v. *South Dakota*, 205 U. S. 93 (1907).

The Court below also erred in invalidating the application of New York's liquor laws through the introduction of a subjective standard of "reasonableness", concluding that the availability of appellee's records to inspection by Customs personnel rendered state control unnecessary to prevent unlawful diversion or use of alcoholic beverages within the State. In imposing a subjective test purporting to determine the "reasonableness" of New York's liquor licensing laws and regulations, the District Court disregarded decisions of this Court which have consistently rejected any judicial consideration of the reasonableness or necessity of state liquor laws. See *State Board of Equalization* v. *Young's Market Co., supra; Mahoney* v. *Triner Corp., supra; Indianapolis Brewing Company* v. *Liquor Control Commission, supra;* and *Finch & Co.* v. *McKittrick, supra.* Furthermore, by limiting their consideration of "reasonableness" to the possibility of diversion of liquors within the State, the statutory court ignored the economic incidents of appellee's operations and the enormous competitive advantages afforded appellee in freeing it from licensing regulation and fees, taxes and such other requirements as limitations on the hours of operation, the mini-

mum age of purchasers or customers, and minimum resale price laws which must be complied with by all liquor licensees within the State.

Another substantial error was the District Court's declaration that the application of New York liquor licensing requirements to appellee's operations would conflict with § 311 of the Tariff Act of 1930 as amended (19 U.S.C. § 1311) and, therefore, be repugnant to the Supremacy Clause. Section 311 of the Tariff Act—dealing with the direct exportation by domestic manufacturers of liquors made in Class 6 warehouses—has no applicability to appellee's resale operations conducted in its unbonded private premises in New York. This section and the Treasury Regulations adopted thereunder, in any event, are concerned solely with exemption from customs duties and were never intended by Congress to provide immunity from compliance with state liquor laws. Such immunity from state control would not only violate § 2 of the Twenty-first Amendment, but would contradict the congressional policy of promoting adherence to state liquor laws as explicitly set forth in the Wilson, Webb-Kenyon and Federal Alcohol Administration Acts.

POINT I

Appellee's liquor operations are clearly encompassed by the language of New York's Alcoholic Beverage Control Law.

It is well established that a state, in exercising its police power to suppress intemperance and minimize the evils resulting from traffic in intoxicating liquors, may prohibit the use, manufacture or sale of intoxicants, or may restrict, regulate and license the manufacture or sale of and traffic in intoxicants as it deems expedient. *Mugler* v. *Kansas*, 123 U. S. 623 (1887); *Kidd* v. *Pearson*, 128 U. S. 1 (1888);

Crowley v. *Christensen*, 137 U. S. 86 (1890); *Cronin* v. *Adams*, 192 U. S. 108 (1904); *Eberle* v. *Michigan*, 232 U. S. 700 (1914); *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939).

The New York Alcoholic Beverage Control Law is completely consistent with this long recognized principle. The purpose and policy of that statute are set forth in § 2 as follows:

> "It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law. It is hereby declared that such policy will best be carried out by empowering the liquor authority of the state to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby, subject only to the right of judicial review hereinafter provided for. It is the purpose of this chapter to carry out the policy in the public interest. The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state. • • •."

That appellee's liquor operations come within the scope of the New York statute is incontestable; indeed, a reading of the complaint confirms it. The complaint describes appellee as a New York corporation "having its principal place of business at Arrivals Building, New York International Airport" (par. 2; R. 1); it further alleges (par. 4; R. 2-5) that wines and liquors are "purchased from the suppliers for export only *and sold by the plaintiff from its leased premises* for export", and that "orders • • • *are received by plaintiff, and paid for at plaintiff's office* in the leased premises." (Emphasis supplied.)

Thus the transactions, as self-described by appellee in its complaint, clearly constitute "sales" or "selling" within the express definition of § 3, subd. 28 of the Alcoholic Beverage Control Law, which reads:

> "'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

The effect of transacting such sales, as appellee unquestionably does, is to invoke the licensing requirements of § 100, subd. 1, which provides:

> "No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

In the light of appellee's acknowledged activities in the keeping, display, solicitation and receipt of orders and payments for, and sale of, alcoholic beverages, it is not surprising that the complaint does not dispute the obvious, *i.e.*, that appellee's operations are within the literal language of §§ 3, subd. 28, and 100, subd. 1 of the Alcoholic Beverage Control Law.

Instead, appellee seeks to evade compliance with New York's liquor licensing requirements by contending that its operations are immunized from those requirements by reason of the Commerce and Supremacy Clauses of the United States Constitution, and also because of the assertedly preemptive provisions of § 311 of the United

States Tariff Act of 1930. We shall show that these contentions, insofar as adopted by the court below, completely ignore or overlook the special status accorded to state control over traffic in intoxicating liquors by § 2 of the Twenty-First Amendment, as well as by such federal legislation as the Wilson,[1] Webb-Kenyon[2] and Federal Alcohol Administration[3] Acts.

POINT II

The licensing requirements of the New York Alcoholic Beverage Control Law, as applicable to appellee's liquor operations, are not repugnant to the Commerce Clause.

A. The New York Alcoholic Beverage Control Law, as an exercise of state power under the Twenty-First Amendment, may not be limited by the Commerce Clause.

The court below, in holding that the application of the licensing requirements of the New York Alcoholic Beverage Control Law to appellee's operations is repugnant to the Commerce Clause, misconceived the full import and effect of § 2 of the Twenty-First Amendment, which declares:

> "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936), this Court held that in light of § 2 of the Twenty-First Amendment, the State's power of regulation over traffic in intoxicating liquors could not be limited by the Commerce Clause (Art. 1, § 8, cl. 3) of the

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[1] 26 Stat. 313, now found in 27 U.S.C. § 121.
[2] 37 Stat. 699, now found in 27 U.S.C. § 122.
[3] 49 Stat. 977, now found in 27 U.S.C. ch. 8.

United States Constitution. In sustaining the validity of a California statute imposing a license fee for importing beer from other states, Mr. Justice BRANDEIS stated (p. 62):

> "The [Twenty-first] Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."

In *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), this Court, in reaffirming the power of the states to control liquor traffic, unequivocally declared (p. 138):

> "The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put."

Other attempts to limit the exercise of State power over intoxicating liquors under the Twenty-first Amendment by invoking the Commerce Clause have similarly been rejected by the federal courts. See *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394 (1939); *Finch & Co.* v. *McKittrick*, 305 U. S. 395, 398 (1939); *American Traveler's Club, Inc.* v. *Hostetter*, 219 F. Supp. 95 (S.D.N.Y., 1963); *General Sales and Liquor Co.* v. *Becker*, 14 F. Supp. 348 (E. D. Missouri, 1936); *Wylie* v. *State Board of Equalization*, 21 F. Supp. 604 (S. D. California, 1937).

In a recent case, *California* v. *Washington*, 358 U. S. 64 (1958), arising under the original jurisdiction of this Court, California applied for leave to file a complaint seeking—under the Commerce Clause—to enjoin Washington statutes and regulations which admittedly discriminated against out-of-state produced wines. The summary fashion in which the Court denied California's motion on the merits, simply citing § 2 of the Twenty-first Amendment, should have settled beyond dispute the right of the states to regulate liquor traffic untrammeled by the Commerce Clause.

Nor is the effect of the Twenty-first Amendment subject to diminution on the basis of any attempt to distinguish foreign from interstate commerce, or to invoke the Export-Import Clause.

In *Gordan* v. *Texas*, 355 U. S. 369 (1958), aff'g 166 Tex. Cr. R. 24, 310 S. W. 2d 328, this Court sustained a Texas excise tax on liquors purchased and imported from Mexico and merely en route through Texas destined for consumption in another state, overriding the contention that the application of the Texas statute violated the Commerce and Export-Import Clauses.

Wylie v. *State Board of Equalization*, 21 F. Supp. 604 (S. D. California, 1937), involved a provision of the California Alcoholic Beverage Control Act requiring an importer's license to bring into the state from Mexico any alcoholic beverages in the quantity of one wine gallon or less for personal use and consumption—even though exempted by federal statute from payment of Customs duties. The application of the California statute was similarly attacked as violating the Commerce and Export-Import Clauses. In dismissing the complaint for want of a substantial federal question, the district court stated (pp. 605-606):

> "[T]he contention that because a citizen may import a certain amount of liquors from the republic of

Mexico, free of duty, his constitutional right is violated if, after the liquor is in his possession, he is required to obtain an importer's license in order to retain it, lacks substance. The Twenty-first Amendment prohibits 'importation' into a state 'in violation of its laws.' The right to import liquor, either with or without the payment of import duties, does not confer the right to possess it within the state (see *License Cases*, 1847, 5 How. 504, 12 L. Ed. 256), any more than the right to transport liquor from state to state confers the privilege of selling it without regulation by a state (*Phillips* v. *Mobile*, 1908, 208 U. S. 472, 28 S. Ct., 370, 52 L. Ed. 578), or under regulations different from those applying to handlers of domestic liquor (*State Board of Equalization* v. *Young's Market Co., supra*). Control of the traffic in liquor by the states has always been considered a proper exercise of their police power. See *Premier-Pabst Sales Company* v. *State Board of Equalization*, D. C. Cal. 1935, 13 F. Supp. 90; *Mugler* v. *Kansas*, 1887, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205. Even before the Twenty-first Amendment, it was held repeatedly that the United States by licensing persons could not confer upon them the right to engage in the sale of liquor in states which prohibited such sale. *License Cases*, 1847, 5 How. 504, 12 L. Ed. 256; *McGuire* v. *Massachusetts*, 1865, 3 Wall. 387, 18 L. Ed. 226; *Pervear* v. *Massachusetts*, 1867, 5 Wall. 475, 18 L. Ed. 608; *United States* v. *Lariviere*, 1883, 108 U. S. 491, 2 S. Ct. 906, 27 L. Ed. 803; *Phillips* v. *Mobile*, 1908, 208 U. S. 472, 28 S. Ct. 370, 52 L. Ed. 578.''

It should be noted that long prior to the enactment of the Twenty-first Amendment, this Court had sustained the right of a state to apply its liquor licensing laws to liquors involved in foreign commerce. See *DeBary & Co.* v. *State of Louisiana*, 227 U. S. 108 (1913), where the Court discussed the effect of the Wilson Law (now 27 U.S.C. § 121)

in sustaining a Louisiana tax as applied to foreign liquors, commenting (pp. 110-111):

> "In reason it is certain that the purpose which led to the enactment of the [Wilson] law was to give the several States power to deal with all liquors coming from outside their limits upon arrival and before sale, thus rendering the state police authority more complete and efficacious on the subject; a purpose which would be plainly set at naught by exempting liquors brought into a State from a foreign country from the operation of the statute."

B. The District Court erred in interpreting the Twenty-first Amendment as having no application except to the state in which liquor is finally delivered and consumed.

Appellee purchases its entire supply of liquors outside the State of New York from wholesalers located in Philadelphia, Baltimore and Washington, D. C. (R. 105, 152), and has them transported across state lines to its own unlicensed premises in New York (R. 105-106, 146-147). Despite these facts, the District Court refused to give any effect to the Twenty-first Amendment in this case, by interpreting that Amendment as permitting the exercise of the state power it confers only by the state in which *final* delivery and use of liquor occurs (R. 203-204, 205).

There is no warrant whatever for reading that limitation into the language of § 2 of the Twenty-first Amendment. If liquors are transported into the State of New York for delivery and sale to appellee—as admittedly is the case here (R. 141, 152)—it is incomprehensible how New York can be held powerless to apply its liquor licensing requirements to appellee's operations. This itself is sufficient to invoke the plain language of that Amendment; it is immaterial whether or not appellee subsequently resells its liquor to airline passengers departing from the State.

Moreover, the District Court's interpretation runs counter to prior decisions of this Court. In *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), the Court rejected a contention that; despite the Twenty-first Amendment, *exports* of liquor remain subject to the Commerce Clause and free of state regulation. There appellant, an Indiana trucking corporation holding a certificate as a contract carrier under the Federal Motor Carrier Act, had been denied a state license by Kentucky to export whiskeys from Kentucky directly to Illinois. Appellant sought to enjoin enforcement of the Kentucky statute law as being violative of the Commerce Clause. In affirming the dismissal of appellant's complaint, this Court stated (p. 140):

> "[T]he State may decline to consider noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband.
>
> We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivery to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity."

In *Gordon* v. *Texas*, 355 U. S. 369 (1958), affirming 166 Tex. Cr. R. 24, 310 S. W. 2d 328, this Court, as we have seen, recognized state control over intoxicating liquors to the extent of sustaining a Texas excise tax on liquors purchased and imported from Mexico and merely passing through Texas en route to another state for consumption, despite appellant's defenses based on the Commerce and Export-Import Clauses. The application of the Texas statute was sustained in a three-line *per curiam* decision citing both the Twenty-first Amendment and *Carter* v. *Virginia*, 321 U. S. 131.

The District Court—again oblivious of the Twenty-first Amendment—read the *Gordon* decision "as no more than

a reaffirmance of the narrow holding in *Carter*". However, it is important to note that the holding in *Carter* was reached independently of any consideration of the Twenty-first Amendment. Thus the *Gordon* decision must mean that the application of a state's liquor laws to liquor destined beyond its borders may be sustained either as an exercise of that same state's police power to prevent illegal liquor traffic within the state—as in *Carter*—or in recognition of its independent powers under the Twenty-first Amendment.

In *Delamater* v. *South Dakota*, 205 U. S. 93, 100 (1907), this Court had held—long in advance of the Twenty-first Amendment—that the soliciting or taking of orders or proposals to purchase intoxicating liquors may be prohibited, restricted or regulated by a state "wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped." Clearly, the subsequent advent of the Twenty-first Amendment affords no basis for any possible suggestion that the extent of state power over liquor traffic, as recognized in *Delamater*, has been diminished thereby.

C. The District Court also erred in imposing its own subjective standard of "reasonableness" to determine the constitutionality of New York's liquor licensing laws.

In holding that the application of New York's Alcoholic Beverage Control Law to appellee's operations contravened the Commerce Clause, the District Court concluded that the application of the New York statute was not reasonably necessary to the protection of the local public interest in preventing unlawful diversion or use of liquor within the State. The Court viewed the availability of appellee's records and inventory to occasional inspection by Customs officers as sufficient to render unnecessary, and therefore unconstitutional, the application of New York's licensing laws to appellee's activities (R. 208).

In thus imposing a subjective test regarding the "reasonableness" of New York's liquor licensing laws, the court below failed to follow precedents of this Court rejecting, in light of the Twenty-first Amendment, any attempt by the judiciary to question the reasonableness of state liquor laws. See *State Board* v. *Young's Market Co.*, 299 U. S. 59, 62 (1936); *Mahoney* v. *Triner Corp.*, 304 U. S. 401, 403-404 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391, 394 (1939); *Finch* v. *McKittrick*, 305 U. S. 395, 398 (1939); Mr. Justice FRANKFURTER concurring in *Carter* v. *Virginia*, 321 U. S. 131, 139 (1944).

As this Court observed in *Mahoney* v. *Triner Corp.*, *supra*, at 404:

> "We are asked to limit the power conferred by the [Twenty-first] Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market* case, p. 62, 'involve not a construction of the Amendment, but a rewriting of it.'"

We might add that even in areas not concerned with intoxicating liquors, this Court in *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963), recently had occasion to repudiate the practice of testing the constitutionality of state economic legislation through judicial determination as to their wisdom and utility.

The District Court sought to justify its consideration of the reasonableness of New York's application of its liquor control laws by citing *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941), and *Carter* v. *Virginia*, 321 U. S. 131 (1944). However, the majority opinions in both cases were explicitly clear that the state liquor laws at issue could be sustained under the Commerce Clause alone, without the need for any consideration of state power under the Twenty-first Amendment. Moreover, both *Duckworth* and *Carter* involved the application of state laws to the transportation of liquors merely passing through the state as

part of a continuous shipment to a consignee in another state. In the instant case, appellee is itself the consignee responsible for the purchase and importation of liquors into New York State (R. 141, 152). The liquors thus sold to appellee remain stored in its private premises for periods of up to 30 days or more (R. 142), until orders for their resale have been received and paid for. At the time the liquors are received at appellee's premises in New York, it is impossible to determine their ultimate destination (R. 128). Clearly, appellee's purchase and resale operations can in no sense be treated as if merely involving a continuous shipment of liquor through the State of New York.

Finally, we call attention to the concluding paragraph of the decision below, which states (R. 208):

> "The case before us does not, therefore, involve reasonable measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York. The Liquor Authority does not seek to use the power of New York to regulate or supervise. It seeks to terminate. This it cannot constitutionally do."

We must frankly submit that the above passage, as an attempt to propound a doctrine of constitutional law, is patently absurd. The District Court apparently recognizes some right on the part of the states to regulate the movement of liquors within their borders; it even claims to leave open the right of New York to "regulate", but not "terminate", appellee's business (R. 200-201, 208)[4]. Yet,

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[4] In submitting a counter-proposed final judgment (R. 209-210), appellants attempted to conform to the decision below by enjoining the application of the State's liquor licensing statutes, but leaving it open to the State Liquor Authority to regulate and supervise appellee's business (assuming that were possible without licensing control) consistent with the purposes and objects of the Alcoholic Beverage Control Law. The rejection of appellants' proposed judgment and the language employed in the final judgment (R. 211-212) illustrate the utter inability of the District Court to apply its "regulate but not terminate" formula, and apparently absolves appellee from all state liquor regulations.

how can a state have the power to regulate effectively the traffic and sale of alcoholic beverages if it cannot "terminate" a business which fails to comply with its liquor licensing requirements and regulations?

Certainly there is no constitutional right to engage in the traffic and sale of alcoholic beverages free from state licensing requirements. This Court has frequently recognized the right of a state to terminate businesses engaged in the sale of liquor for failure to comply with liquor licensing requirements and regulations. See *Mugler* v. *Kansas*, 123 U. S. 623 (1887); *Kidd* v. *Pearson*, 128 U. S. 1 (1888); *Crowley* v. *Christensen*, 137 U. S. 86 (1890); *Cronin* v. *Adams*, 192 U. S. 108 (1904); *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936). The reasoning of this Court in *Crowley* v. *Christensen, supra*, at 91, is especially pertinent here:

> "There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. *It is a matter of legislative will only.*" (Emphasis supplied)

D. Even if federal courts could impose tests of "reasonableness" to determine the constitutionality of state liquor laws, the New York statute as applied to appellee's operations should be sustained as a valid exercise of state police power.

Assuming "reasonableness" was a proper federal judicial standard for determining the constitutionality of state liquor laws under the Twenty-first Amendment, it is

submitted that the application of New York's liquor licensing requirements to appellee's operations would not be precluded thereby.

First, it should be noted that appellee, neither in its complaint nor before the court below, has ever contended that New York's liquor licensing requirements are unreasonable or violative of due process requirements. Yet, the District Court not only applied a test of reasonableness, but subjectively constructed their test as being whether the New York laws were necessary to prevent unlawful diversion or use of alcoholic beverages within the State.

The record clearly discloses that appellee is not subject to any government bond in the conduct of its liquor operations (R. 121) and does not store its liquors in a customs-bonded warehouse. There is no Customs officer assigned to appellee's premises to witness the entry, storage or removal of liquors (R. 133), nor to witness the asserted delivery of liquors from appellee's premises to the planes (R. 136-138). Despite these facts, the District Court concluded that the availability of appellee's records and inventory to occasional inspection by Customs officials rendered the application of New York's licensing laws unnecessary and hence unconstitutional. Apparently, the District Court overlooked this Court's warning in *Duckwork* v. *Arkansas, supra*, at page 396, that "efforts at effective regulation, state and national, of intoxicating liquor, evidenced by the long course of litigation in this Court, have not left us unaware of the peculiar difficulties of controlling it or of its tendency to get out of legal bounds".

The requirement of an appropriate license to sell and traffic in alcoholic beverages in New York is the statutory key to the state's comprehensive regulatory program designed by the Legislature to insure that all traffic in liquors shall be under constant state surveillance and control, and conducted in such manner as to minimize its dan-

gers to the community. Before a liquor license may be issued, the New York State Liquor Authority must, among other considerations, be satisfied that the public convenience and advantage will be promoted by its issuance,[5] that the applicant has not been convicted of a felony[6] and that the location of the licensed premises complies with requirements as to its distance from schools, places of worship and other licensed premises[7], and with the requirement of a street-level entrance.[8] In addition, each retail liquor licensee must maintain adequate books and records for inspection by State Liquor Authority representatives.[9] By enjoining the application of New York's liquor licensing requirements, the District Court has granted appellee *carte blanche* to operate free from all safeguards which the Legislature considered as being necessary to protect the public interest.[10]

The court below also operated under the misconception that the possibility of diversion of liquors represents the sole concern of New York in appellee's operations. The court completely ignored the economic incidents of appellee's operations; in holding New York's licensing regulations to be inapplicable, it has absolved appellee from complying with such requirements as limitations on the

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[5] New York Alcoholic Beverage Control Law §§ 2, 17, see *Matter of Brenner* v. *O'Connell*, 308 N. Y. 636, 127 N. E. 2d 715 (1955).

[6] New York Alcoholic Beverage Control Law § 110(4).

[7] New York Alcoholic Beverage Control Law § 105, subds. 3, 4.

[8] New York Alcoholic Beverage Control Law § 105, subd. 2. In describing the need for this section, Justice HOFSTADTER, in *Lipshitz* v. *T. & D. Wine Liquors, Inc.*, 190 Misc. 261, 75 N.Y.S. 2d 321, stated: "Plainly, the underlying purpose of the statute was to assure proper visibility into a licensed premises so that all of the activity in the conduct of the business would be open and apparent to the general public and to enforcement officials." The location of appellee's premises on the second floor of the Arrivals Building at Idlewild Airport does not satisfy the requirements of this section.

[9] New York Alcoholic Beverage Control Law § 105, subd. 15.

[10] See footnote 4, *infra*.

hours it may operate,[11] the customers it may deal with,[12] and of adhering to New York's minimum consumer resale prices.[13] Regardless of the ultimate destination of its liquors, appellee's freedom to sell independently of these limitations and without payment of license fees and taxes provides it with an enormous economic advantage over retail licensees within the State, and also deprives the State of revenues. Such competitive advantage is inimical to the just and orderly enforcement of New York's liquor control laws and encourages the growth of similar unlicensed liquor operations throughout the State.[14]

POINT III

The application of the New York Alcoholic Beverage Control Law to appellee's liquor operations is neither precluded by Section 311 of the Tariff Act of 1930 nor repugnant to the Supremacy Clause.

The foundation for the complaint in this action is appellee's contention that (1) its operations constitute "exports" within the meaning of § 311 of the Tariff Act of 1930 (19 U.S.C. § 1311), and (2) § 311 is assertedly preemptive and bars application of New York's Alcoholic

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[11] New York Alcoholic Control Law § 105, subd. 14.

[12] New York Alcoholic Control Law § 65.

[13] New York Alcoholic Control Law § 101-c(5).

[14] As noted at pp. 7-8 and Appendix A in our "Reply to motion to affirm" previously submitted to this Court, a concern called Ammex Warehouse Company, Inc. opened a store in May, 1963, in Niagara Falls, New York, selling "duty-free" liquors at "below-cost" bargain prices, although this company has never applied for, or obtained, a license for any part of its operations from the New York State Liquor Authority. This same company has also announced plans to open additional stores for the sale of alcoholic beverages in Niagara Falls, Buffalo, Champlain, Ogdensburg, Watertown and Idlewild Airport in the State of New York and advertises that it is operating at locations in Arizona, California, Maine, Michigan, Texas, the State of Washington, and Washington, D. C.

Beverage Control Law to its operations. In declaring New York's liquor licensing requirements to be in conflict with § 311 in this instance and, therefore, repugnant to the Supremacy Clause, the court below entirely misapprehended the scope and effect of this federal customs statute.

A. Appellee's activities are not within the ambit of § 311 of the Tariff Act of 1930 and relevant regulations.

Section 311 of the Tariff Act authorizes domestic manufacturers of articles made in "Class 6" bonded warehouses to export such articles free from internal-revenue taxes, upon posting bonds and observing all applicable laws and regulations. Domestic manufacturers may be relieved of customs duties upon "*direct* shipment and exportation" of their manufactured articles from the bonded warehouse where made, or when "withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the *sole purpose of immediate export therefrom.*" (Emphasis supplied.)

The regulations adopted under the authority of § 311, and permitting warehouse withdrawals for transportation and exportation, permit manufacturers to meet transportation obstacles which might prevent the exportation of their articles in one direct shipment. Thus, § 18.19(b)(3) of Title 19 C.F.R. provides:

> "If any part of a shipment is not exported or when a shipment is divided at the port of exportation, extracts in duplicate from the manifest on file in the customhouse shall be made on customs Form 7512 for each part, one copy to be sent to the discharging inspector and the other to the landing inspector to be used as a report of exportation. *The splitting up for exportation of shipments arriving under warehouse withdrawals for transportation and exportation shall be permitted only when various portions of a shipment*

are destined to different destinations, when the export vessel cannot properly accommodate the entire quantity, or in other similar circumstances. * * *" (Emphasis supplied.)

Appellee's operations are clearly outside the scope of § 311, particularly in light of the following:

(1) Although § 311 is limited to domestic manufacturers of articles made in "Class 6" bonded warehouses, appellee does not manufacture liquors (R. 139) or any other articles intended for export. Rather, in purchasing its supply of liquors from wholesalers (R. 105), storing and thereafter reselling them to airline passengers (R. 142, 143), appellee is obviously engaged in a retail liquor business, which cannot conceivably come within the language and purpose of § 311.

(2) Appellee is not engaged in "direct" or "immediate" export as required by § 311. Nor is appellee a mere conduit in the direct exportation of such liquors. Appellee purchases its liquors from out-of-state wholesalers (R. 141, 152), acquiring and retaining full title until and unless it resells them to customers at its premises at Idlewild Airport. Liquors may be stored in appellee's private premises for indefinite periods (in some cases for thirty days or more, by appellee's own admission—R. 142) until they have been resold to individual airline passengers.

(3) Contrary to the requirements of § 311 and relevant regulations,[18] appellee's supply of liquors are not with-

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[18] See, *e.g.* Title 19 C.F.R. § 19.15(g), which provides:

(g) Articles may be withdrawn for transportation and delivery to a bonded storage warehouse at an exterior port under the provisions of section 311, Tariff Act of 1930, as amended, *for the sole purpose of immediate export* or may be withdrawn pursuant to section 309 (a) of the tariff act, as amended. Such withdrawal shall be effected on customs form 7512 as provided for in section 18.18 of these regulations. *A rewarehouse entry shall be made at the exterior port* in accordance with section 8.33 of these regulations *supported*

(*Footnote continued on following page*)

drawn from Class 6 bonded manufacturing warehouses. Appellee's president testified at the trial that some sixty per cent (60%) of the liquors purchased and resold by appellee are imports of foreign manufacture (R. 123). Imported liquors cannot be manufactured, stored in or withdrawn from Class 6 warehouses, which are defined by § 19.1(a) of Title 19 C.F.R. as "warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal revenue tax; * * *." The same Treasury regulation requires imported liquors to be stored "exclusively" in either Class 2 or Class 3 warehouses.[16]

(*Footnote continued from preceding page*)

by a bond on customs Form 7555 in an amount equal to the aggregate sum of double the estimated amount of ordinary customs duties on the merchandise (including any taxes imposed thereon which are required by law to be treated as duty imposed by the Tariff Act of 1930), plus the estimated amount of any other tax or taxes on the merchandise collectible by the collector of customs. *The recital clause of such bond* shall be modified to *show that the merchandise is the product of a bonded manufacturing warehouse, class 6, and that it has been rewarehoused at the exterior port for the sole purpose of immediate export* or withdrawal pursuant to section 309 (a) of the tariff act, as amended. The following new condition shall be added to the bond: "And if said articles shall be exported or withdrawn in accordance with the provisions of section 311 or 309 (a), Tariff Act of 1930, as amended, in the manner prescribed by the regulations; or, in default thereof, if the obligors shall pay to the collector as liquidated damages an amount equal to the aggregate sum of double the duties assessable on such part of the shipment as shall not have been so exported or withdrawn, plus the amount of any internal-revenue tax assessable thereon." (Emphasis supplied.)

[16] "§ 19.1—Classes of Customs Warehouses—(a) Customs warehouses shall be designated according to the following classifications:

* * *

Class 2—Importers private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof. A warehouse of Class 4 or 5 may be bonded exclusively for the storeage of goods imported by the proprietor thereof, in which case it shall be known as a private bonded warehouse.

Class 3—Public bonded warehouses used exclusively for the storeage of imported merchandise."

The admission at the trial that at least 60% of appellee's trade is in imported liquors makes a hollow mockery of appellee's flag-waving assertion that its profit-making operations "opens new markets for the export of American liquors" (Complaint, par. 4, at R. 5). It renders no less misleading appellee's contention (R. 3) that its operations are subject to 26 C.F.R., § 201.467, which requires liquors intended for export to be labelled "bottled for export from the U.S.A." As appellee's president also admitted at the trial (R. 123-124), that labelling requirement applies only to *domestic* liquors, the *minor* part of appellee's stock in trade.

(4) Although § 311 and the regulations[17] thereunder require the posting of a bond, the testimony below discloses that appellee has never posted a bond with the Secretary of the Treasury or any other governmental agency[18] (R. 121, 147-148).

(5) There is no rewarehousing of liquors at appellee's premises, nor continuous Customs control and custody of such liquors in compliance with Treasury Regulations. It is clear from the trial testimony that appellee's premises neither comply with the definition of a customs bonded warehouse as set forth in § 19.1(c) of Title 19 C.F.R., which reads:

> "(c) When parts of buildings are used as customs bonded warehouses; the bonded and nonbonded portions thereof shall be effectively separated by partitions of substantial materials and construction *erected*

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[17] See footnote 15, *infra*.

[18] Appellee has also ignored § 557(b) of the Tariff Act of 1930 [19 U.S.C. § 1557(b)], which requires the filing of a bond by the transferee upon the withdrawal of merchandise from a bonded warehouse.

in such a manner as to render it impossible to enter the premises in the absence of the customs warehouse officer without such violence as to make the entry easy of detection. * * *" (Emphasis supplied.);

nor with the requirements for a bonded manufacturing warehouse set forth in § 19.13(g) of Title 19 C.F.R., which provides:

"(g) Each bonded manufacturing warehouse shall have a portion separated from the remainder of the premises and secured by customs locks to be used exclusively for the storage of all imported merchandise, domestic spirits, or other materials subject to internal-revenue tax transferred into such warehouse for manufacture. A like compartment shall be provided to be used exclusively for the storage of products manufactured in the warehouse. *The premises shall be so secured as to prevent any person from having access thereto in the absence of the customs warehouse officer in charge,* and the goods stored therein shall be so arranged as to give all practicable convenience to such officer in making the required examination or taking samples for analysis. (Sec. 311, 46 Stat. 691, as amended; 19 U.S.C. 1311.)" (Emphasis supplied.)

Contrary to the requirements of these Treasury Regulations, appellee's president conceded that there is no customs warehouse officer in charge and in attendance at appellee's premises to witness the entry and withdrawal of liquors, and to insure that all persons having access to such premises shall be under his detection (R. 133). The appellee's president also disclosed that no customs officer is assigned to be present when liquors are removed from suppliers' trucks to appellee's premises (R. 104), when liquors are delivered to a plane (R. 136-137) or while they are aboard the plane in flight (R. 137-138). In fact, ap-

pellee's testimony reveals that the so-called continuous custody and control by Customs amounts to no more than a routine paper check accomplished through comparing transportation manifests, furnished by appellee's suppliers, with records of disposition completed by appellee after each full shipment of liquors has been sold and removed from its premises.

In an attempt to support its claim that its operations are within the meaning of § 311, appellee over objection introduced a copy of a letter from the Acting Commissioner of Customs to the Collector of Customs in New York (Plaintiff's Exh. 3, R. 93-94, 12). Appellee failed to establish any foundation for this letter, the nature of the proposals which were suggested to the Acting Commissioner, or authority in law for the Acting Commissioner's power to exercise jurisdiction in this matter.

A letter from Customs can scarcely be considered as an administrative determination that is binding on the State of New York. See *In re Miller Land and Livestock Co.*, 56 F. Supp. 34 (D. C. Mont., 1944). In that case, a taxpayer sought to avoid liability for state taxes by claiming that his cattle had been imported from Mexico and confined in a customs bonded warehoue. Although the taxpayer introduced a letter under seal from the Collector of Customs and Customs warehouse receipts in support of its claim, the tax was sustained upon the state's showing that the applicable federal statutes and regulations pertaining to bonded warehouses had not been complied with by customs officials.

In the instant case, however, even if the Custom letter could be accepted at face value, it cannot serve to substantiate appellee's claim that its operations come within the meaning of § 311. It is significant that the letter was dated April 15, 1958—a full two years before appellee com-

menced its operations. Whatever may have been the nature of its proposed procedures in 1958, it is clear from appellee's trial testimony that its actual business operations, commenced two years later, do not conform to the requirements of the Acting Commissioner's letter and the proposed procedure on which it was based.

The Customs letter refers to the "withdrawal of liquors from Class 6 bonded manufacturing warehouses for rewarehousing in the company's locker at Idlewild Airport." Yet, as already noted, at least 60% of appellee's trade is in foreign liquors which cannot be stored in—much less withdrawn from—Class 6 bonded warehouses; nor did appellee's president, its sole witness, even have any actual knowledge as to the type of warehouse from which the domestic liquors (the minor portion of the inventory) was received. And, of course, appellee itself does not operate or maintain any bonded warehouse, eliminating any possibility that there can be "rewarehousing" of liquors at appellee's premises even as contemplated and required by the Acting Commissioner of Customs in his letter.

B. In any event, § 311 does not absolve appellee from complying with the New York Alcoholic Beverage Control Law.

Even if we assume, contrary to the evidence, that appellee's operations are within the meaning of § 311, it cannot be shown how this would in any manner restrict or preclude New York from regulating or licensing sales and traffic in intoxicating liquors within its borders. Certainly, no language which would support the right of customs officers to prevent state control over intoxicating liquors can be found in § 311, or in any other federal statute or regulation. On the contrary, numerous federal statutes specifically recognize the rights of the states to regulate and license traffic in intoxicating liquors regardless of the effect on interstate or foreign commerce.

As early as 1890, Congress, by enactment of the "Wilson Act" (26 Stat. 313, now found in 27 U.S.C. § 121), provided that:

> "All fermented, distilled, or other intoxicating liquors or liquids *transported into any State* or Territory or remaining therein for *use*, consumption, *sale or storage* therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (Emphasis supplied.)

The "Webb-Kenyon Act" (37 Stat. 699, Act of Mar. 1, 1913, re-enacted by Act of Aug. 27, 1935, 49 Stat. 877, and presently found in 27 U.S.C. § 122) further prohibits shipment or transportation of intoxicating liquors to any state "to be received, possessed, sold, or in any manner used" in violation of the law of such state regardless of its interstate or foreign source.

Of particular significance is the "Federal Alcohol Administration Act" (Act of August 29, 1935, ch. 814, 49 Stat. 977, presently found in Chapter 8 of Title 27 of the United States Code), which imposes as a requirement for engaging in the business of importing, distilling, rectifying, warehousing, or "purchasing for resale at wholesale" distilled spirits, wines or malt beverages, the receipt of a basic permit from the Secretary of the Treasury. The issuance of a basic permit is conditioned upon compliance "with the Twenty-first Amendment and laws relating to the enforcement thereof" (27 U.S.C. § 204[d]) and shall be denied by the Secretary of the Treasury upon finding "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted" (27 U.S.C. § 204[a] [2] [C]).

In the light of these Acts of Congress revealing a historic federal policy of protecting the exercise of the police powers of the states in their control of intoxicating liquors, regardless of their effect on interstate or foreign commerce, the argument for federal preemption by reason of the asserted application of § 311 is clearly without merit.

A recent attempt to avoid state liquor control laws by reliance upon a federal customs "duty-free" allowance statute was unanimously rejected by a statutory three-judge court in the Southern District of New York in *American Travelers Club, Inc.* v. *Hostetter*, 219 F. Supp. 95 (1963). In that case, the application of the New York Alcoholic Beverage Control Law[19] to bar the importation of alcoholic beverages shipped into the State of New York by mail-order in quantities of one gallon per person, by travelers returning from foreign countries, was attacked as contravening "federal rights" under 19 U.S.C. § 1201, para. 1798 (allowing such shipments to be "duty-free"), and as therefore violating the Commerce and Supremacy Clauses. In rejecting this contention and awarding judgment on the merits to the State Liquor Authority, Judge MEDINA wrote (pp. 105-106):

> "We reject this claim as we interpret the federal statute merely to grant an exemption from the levy of customs duties and not to confer an affirmative federal right upon a commercial enterprise to import liquor into a state notwithstanding the state's prohibitions against such transportation."

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[19] The key provision involved in the *American Travelers* case was § 102 (1)(c) of the New York Alcoholic Beverage Control Law, which reads: "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." It should be noted that although not expressly challenged by appellee here in its complaint, appellee's purchase of liquors from out-of-state wholesalers and shipment into New York and receipt of such liquors, in the absence of a state license, is in direct violation of § 102 (1)(c).

And further (p. 108):

> "Whether one takes the position that the Twenty-first Amendment frees the states entirely from the ambit of the Commerce, Due Process and Equal Protection Clauses, or whether one takes the view that reasonable regulations of liquor traffic by a state constitute a proper exercise of the police power, it is abundantly clear that New York has not violated any of the constitutional provisions relied upon by plaintiff."

Since at least the effective date of the Twenty-first Amendment (on December 5, 1933—three years after the enactment of the Tariff Act of 1930), federal power over intoxicating liquors has been subordinated to the authority of the states to control all liquor traffic within their borders. The Federal Government retains the right to exercise its acknowledged jurisdiction in the field of interstate and foreign commerce, but when such jurisdiction affects traffic in intoxicating liquors, it must be supplemental or subordinate, and not hostile, to that part of the state's power as is constitutionally rendered invulnerable and absolute under the Twenty-first Amendment. Thus, even where as encompassing a federal statute as the Sherman Anti-Trust Act has been applied to transactions involving intoxicating liquors, the federal courts have been scrupulous to insure that the application of the federal statute did not tend to interfere with the enforcement of state liquor control laws. See, *e.g.*, *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 299 (1945); *Washington Brewers Institute* v. *United States*, 137 F. 2d 964 (9th Cir., 1943), cert. den. 320 U. S. 776. As Mr. Justice FRANKFURTER, in his concurring opinion in *United States* v. *Frankfort Distilleries*, *supra*, stated (pp. 300-301):

> "Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from

the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment."

The District Court's assertion—that customs controls under the purported authority of § 311 of the Federal Tariff Act render the licensing requirements of the New York Alcoholic Beverage Control Law a nullity—is a definite assertion of hostility to and denial of state authority under the Twenty-first Amendment and cannot be sustained.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Southern District of New York should be reversed and the case should be remanded to the statutory court with instructions to dismiss the complaint and to award judgment to the appellants on the merits, with costs.

Dated: New York, N. Y., January 20, 1964.

Respectfully submitted,

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APPENDIX

Federal and State Statutes.

Section 311 of the United States Tariff Act of 1930, as amended (19 U.S.C. § 1311) provides:

"§ 1311. Bonded manufacturing warehouses

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided,* That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *provided further,* That the manufacture of distilled spirits from grain starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days

after June 17, 1930, shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received in such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, that the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, ch. 65, 18 Stat. 24, in said bonded warehouses may be with-

drawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco on its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such

cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 3433 of the Revised Statutes shall, as far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottles in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided,* That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further,* That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. June 17, 1930, c. 497, Title III, § 311, 46 Stat. 691; June 26, 1936, c. 830, Title IV, § 404, 49 Stat. 1960."

Federal and State Statutes.

NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW.

Section 3, subdivision 28 of the Alcoholic Beverage Control Law provides:

"§ 3. *Definitions*

"Whenever used in this chapter, unless the context requires otherwise:

* * * * *

"28. 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Section 62 of the Alcoholic Beverage Control Law provides:

"§ 62. *Wholesaler's liquor license*

"Any person may apply to the liquor authority for a license to sell liquor at wholesale. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a certified check, bank officers' check or draft, or money order for the amount required by this article for such license. If the liquor authority shall deny the application it shall return the fee to the applicant, less fifteen dollars. If the liquor authority shall grant the application it shall issue a

license in such form as shall be determined by its rules. Such license shall contain a description of the licensed premises and in form and in substance shall be a license to the person therein specifically designated to sell liquors at wholesale in the premises therein specifically licensed to duly licensed wholesalers, retailers and permittees in this state, and to sell liquor in bulk to a licensed rectifier or to a permittee engaged in the manufacture of products which are unfit for beverage use, for use in the manufacture of products produced and sold by such rectifier or permittee, and to sell or deliver liquor to persons outside the state pursuant to the laws of the place of such sale or delivery. Such a license shall also include the privilege to sell wine at wholesale under the same terms and conditions without the payment of any additional fee. As amended L. 1947, c. 132; L. 1951, c. 581, § 3, eff. April 6, 1951."

Section 100, subdivisions 1 and 2 of the Alcoholic Beverage Control Law provides:

"§ 100. *Alcoholic beverages generally*

"1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

"2. No manufacturer and no wholesaler shall sell, or agree to sell or deliver in this state any alcoholic beverage for the purposes of resale to any person who is not duly licensed pursuant to this chapter to sell such beverages, at wholesale or retail, as the case may be, at the time of such agreement and sale."